Department of Law Monthly Report

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In This Issue

Collections & Support

PERSONNEL CHANGES

The month of January saw several personnel changes in the section. Rosalie Nizich, the litigation assistant responsible for collecting civil judgments owed to the state, left the section to take a position at the Regulatory Commission of Alaska. She had many years of service with the Department of Law and is already greatly missed. In addition, AAG Susan Daniels joined the section as a child support attorney this month. Ms. Daniels comes to us from the Commercial Section in Anchorage.

CIVIL & CRIMINAL COLLECTIONS UPDATE

In January 2002 the Collections Unit opened one civil collection file, 14 APOC penalty collection files, and three OSHA penalty collection files. We closed three OSHA penalty and 13 APOC penalty collection cases. Demand letters were sent to 29 debtors. Complaints were filed in two cases and one writ of execution was issued.

On the criminal side, we have received $2,937,772.45 from the 2001 PFD attachment through January. The unit sent 58 letters responding to written inquiries from defendants

and courts regarding the PFD attachment, payment agreements, and other collection issues. We requested 30 refunds be issued and distributed 28 refund checks to defendants, courts, and other agencies.

VICTIM RESTITUTION COLLECTIONS BEGIN

The Collections Unit has started receiving restitution judgments for collection. In January we received six restitution judgments, two of which had to be returned to the issuing courts due to insufficient information. Initial notices were sent to the recipients in the other four cases. We are still working with the courts and other agencies to finalize the forms and procedures for restitution collection.

COURT MODIFIES SUPPORT OBLIGATION

In the Koenig case, AAG Connie Carson moved to modify Darlene Koenig's child support obligation from $50 per month to $257 per month. An evidentiary hearing was held before Master Brown and was attended by Ms. Carson on behalf of CSED and by Mr. Koenig. Ms. Koenig did not appear. After reviewing Ms. Carson's motion and listening to statements from both Ms. Carson and Mr. Koenig, Master Brown recommended that the support obligation be increased to approximately $309 per month. This recommendation was based on information provided by Mr. Koenig that Ms. Koenig had received quarterly and year-end dividends from CIRI. Master Brown accessed the CIRI web page, confirmed the distribution amounts, and included those amounts in the calculation of the ongoing support obligation. Neither Mr. Koenig nor AAG Carson opposed the proposed increase, and the court issued the recommended order on January 29, 2002.

COURT ENTERS FINAL JUDGMENT ON REMAND

AAG Pamela Hartnell obtained a final judgment in the Sielak case. This case was on remand from the Alaska Supreme Court. It involved a lengthy dispute over the disestablishment of paternity and a request by the obligor, Sielak, for a refund of the support collected from him before his legal relationship with the child was terminated. Sielak asked the court to order CSED to refund all of the amounts collected from him (approximately $17,000) plus pre-judgment interest from the date of collection forward. Ms. Hartnell filed a responding motion for summary judgment, arguing that the state's liability was limited to the amount retained by the state as public assistance reimbursement ($6,818) and post-judgment interest on that amount. Ms. Hartnell argued that CSED could not be ordered to refund the balance of the amounts collected because those amounts had already been disbursed to the custodial parent. Judge Steinkruger agreed and granted CSED's motion for summary judgment ($6,818 plus post-judgment interest to Sielak for money collected and retained by CSED for public assistance reimbursement).

COURT DENIES PETITION TO DISESTABLISH PATERNITY

In Aburto, AAG Jeff Killip opposed an obligor's petition to disestablish paternity. Judge Harold Brown denied the petition "for the reasons articulated in CSED's [opposition]." In this case, paternity was based on marriage, and Mr. Aburto had failed to challenge paternity within the 3-year period allowed under AS 25.27.166(b)(2). More than a year ago, the court had denied a similar motion for genetic testing – without prejudice – because Mr. Aburto failed to submit a sufficient factual basis that he was not the biological father, under AS 25.20.050(e)(2)(B). Mr. Aburto then submitted the present petition to disestablish paternity but failed to add anything to the factual basis previously found insufficient by the court. Mr. Aburto relied heavily on the peace of mind he would enjoy if paternity were conclusively revealed through genetic testing, as he had wondered over the years whether his 15-year-old daughter is in fact his biological child. Mr.

Killip argued that Mr. Aburto's motion did not have a sufficient factual basis, was not in the child's best interests, and was improper because the mother and the child were willing to undergo genetic testing outside the judicial forum. Judge Brown agreed with these arguments and denied the petition.

Commercial Section

COURT AFFIRMS REVENUE'S DENIAL OF PFDS'

This administrative appeal concerns the applications that Mr. Lorenz filed on behalf of his two children for 1998 Alaska Permanent Fund Dividends. The Department of Revenue denied his application for one child because the child had been outside of Alaska for more than 180 days in 1997. His application for the other child was denied because the Division of Family and Youth Services filed a competing application for the PFD. The Fairbanks Superior Court affirmed the department denials, finding that during 1997 one child had been out of state for more than 180 days and that the other had been in DFYS custody. AAG Mike Barnhill represented the Department of Revenue in the case.

COURT UPHOLDS DISCIPLINE OF WRANGELL DOCTOR

Superior Court Judge Mark Rindner recently upheld a discipline order imposed by the State Medical Board against a physician named Grace Shimotsu. While employed at the Wrangell General Hospital, Dr. Shimotsu allowed a 17-year-old high school student (the daughter of the hospital administrator, whom Shimotsu was dating) to inject an anesthetic, assist in the insertion of a Foley catheter, and suture the wound of an accident victim in the hospital emergency room without the knowledge or consent of the patient. At one point the doctor left the ER to check on x-ray results, allowing the high school student to continue to suture the patient's wound while unsupervised.

When interviewed, and again at the hearing, both Shimotsu and the student denied that the student had set the sutures, but the hearing officer and the board found the testimony of the patient, three nurses, and an EMT who witnessed the conduct to be more credible. The board had ordered a 60-day suspension of Shimotsu's license to practice medicine in Alaska, a fine of $6,000 ($1,500 for each of four counts), and the completion of a course in ethics for physicians.

The superior court upheld the board's decision, ruling that the state statutes regarding patient standards of care were not vague, the board's decision was supported by substantial evidence, and the board did not abuse its discretion. Shimotsu has decided not to pursue an appeal to the Alaska Supreme Court. AAG Gayle Horetski handled the case at both the administrative and appellate levels.

COURT DECLINES TO DISCHARGE STUDENT LOAN

Susan Ware owes ACPE approximately $8,300 for two student loans. She received a Chapter 7 discharge in bankruptcy in November 1999. Under the bankruptcy code, student loans are generally not discharged unless the debtor can show that the payment of the student loan would cause an undue hardship. In April of 2002, Ms. Ware filed a complaint in the superior court requesting that her student loans be determined to have been discharged because they impose an undue hardship. Ms. Ware claimed she could not maintain a minimal standard of living and pay her student loans while earning only $1,052 per month.

At trial, AAG Mary Ellen Beardsley took the position that Ms. Ware has the ability to improve her circumstances by getting a full-time job (or even a regular part-time job) and she could also repay her student loans through

the use of her PFDs. The state's only witness was the plaintiff, Ms. Ware, who did at one point agree that even available part-time employment for which she qualified was better than her current employment. At the conclusion of the trial, Judge Michalski ruled that her economic woes were of her own making and that her student loans were not dischargeable. He also entered judgment on the state's counterclaim for the total amount owing on the loans with costs and attorney's fees to follow.

PROCEEDINGS CONTINUE ON VALDEZ FISHERIES DEVELOPMENT ASSOCIATION CASE

In 1997 Sea Hawk Seafoods obtained a $2.5 million judgment in state superior court against Valdez Fisheries Development Association (VFDA), which runs the hatchery in Valdez and owed the state Division of Investments in excess of $8 million in loans. Concerned that the judgment put its loans in jeopardy, the state called the loans due. VFDA paid the state approximately $2.1 million in cash and assignments. Sea Hawk went back to court in its action against VFDA, claiming this payment was a fraudulent transfer. VFDA filed for Chapter 11 protection in March 1998. Settlement negotiations took place in bankruptcy, resulting in VFDA paying Sea Hawk $1.55 million in full satisfaction of the judgment. The day after the bankruptcy court dismissed the bankruptcy, Sea Hawk filed a motion in the state court action seeking a judgment against the state in excess of $900,000 to make up the difference between the amount of its judgment and what it received from VFDA in the bankruptcy settlement.

AAG Mary Ellen Beardsley represents the state, which takes the position that the fraudulent transfer claim against it was extinguished by the bankruptcy settlement. Though the state had not signed the settlement agreement, it had to be approved by the state. The state agreed to forego its 1999 payment from VFDA and agreed to loan VFDA 1999 operating funds so that VFDA could use all its cash to fund the settlement. The superior court ruled that the issue of the scope of settlement agreement should go back to the bankruptcy court for determination. The Alaska Supreme Court affirmed this decision.

So back to bankruptcy court everyone went and again briefed the issue whether the state was involved in a conspiracy to commit a fraudulent conveyance and whether the state was a party to or beneficiary of the settlement agreement. Bankruptcy Judge MacDonald raised the question of whether he had jurisdiction to even hear this issue based on the Marathon Oil decision. Briefing was submitted, with the state arguing the abstention issue and VFDA addressing the jurisdiction issue under 28 U.S.C. § 1334(b). Judge MacDonald concluded that the issue before him is a related proceeding over which the bankruptcy court has jurisdiction and that the mandatory abstention provisions are inapplicable to this controversy. He ordered Sea Hawk to file an adversary proceeding so that an evidentiary trial could be held to determine whether the settlement agreement between VFDA and Sea Hawk also includes Sea Hawk's fraudulent conveyance claim against the state. It is expected that trial will take place sometime in late summer.

ABC BOARD

AAG Linda Kesterson assisted the staff of the Alcoholic Beverage Control (ABC) Board in filing four accusations against licenses in January. Accusations were filed against Bering Sea Saloon and Breakers Bar, both in Nome, for violations of the liquor laws stemming from illegal drug activity on the premises. An accusation was filed against Goodnight Inn Goodnight Out Lounge in Soldotna for various violations arising from a drunken person on premises. And an accusation was filed against Steve's Sports Bar in Anchorage for violation of hours of operation.

At its January meeting in Juneau, the ABC Board adopted the proposed decision of hearing officer Mark Wittow affirming the board's earlier decision denying renewal of the Alaska 1910 license in Fairbanks for failure to operate for five consecutive years. AAG Kesterson represented the staff of the ABC Board at the remand hearing in Fairbanks in June 2001. The hearing was ordered by the superior court on the narrow issue of selective enforcement following a decision of the supreme court that affirmed the board's original decision on most counts, but permitted the pro se licensee leave to seek limited relief from the superior court. The licensee indicated at the board meeting that she will appeal the new decision.

AHFC AWARDED PUNITIVE DAMAGES

AAG Kari Kristiansen represented the Alaska Housing Finance Corporation (AHFC) in obtaining a punitive damages award against two Section 8 participants in Anchorage for failing to disclose income. Federal law requires that Section 8 participants accurately report changes in income so as to determine the partipants' subsidized rent amount. In 1998 and 1999, Section 8 participants Patrice Campbell and her daughter Tyresa Burkhead submitted written statements to AHFC reporting family income. In March 2000, AHFC discovered that Ms. Burkhead had failed to disclose to AHFC that she had been working since April 1998. AHFC also discovered that Ms. Campbell had not reported income from a daycare business she had been operating out of her residence since January 1999. Based upon the unreported additional income, AHFC determined that Ms. Campbell and Ms. Burkhead fraudulently received $8,931 in housing benefits. The case went to trial on January 9, 2002. On January 31, 2002, Judge Sigurd Murphy awarded AHFC compensatory damages in the amount of $8,931 and punitive damages in the amount of $26,793.

Environmental

STATE COMPLETES TOKSOOK BAY SETTLEMENT OBLIGATIONS

The Toksook Bay litigation involved a spill from a state-owned fuel pipe that contaminated a village water system, leading to a suit by 500 plaintiffs against the state and other defendants. The parties reached a final resolution in 1995 that called for, among other things, a projected $400,000 in state-funded cleanup work in the village. A substantial dispute later developed over whether the state had fulfilled this obligation. By negotiation between counsel, in close cooperation with the Alaska Native Tribal Health Consortium and the U.S. Public Health Service, it has been possible to eliminate this dispute. The negotiation achieved better results for the community than had been anticipated in 1995, while saving the state between $50,000 and $100,000 of the expense that was projected in 1995. In January 2002, the parties were able to make a final report to the court reflecting completion of the state's role in the settlement. AAG Chris Kennedy has worked on the case since its inception in 1993.

Fair Business Practices

OCCUPATIONAL LICENSING: ACTION TAKEN AGAINST DENTIST AND DOCTOR

AAG Roger Rom is representing the Division of Occupational Licensing in a matter involving the dental board's summary suspension of a dentist's license following a three-year investigation. Due to a technical deficiency in the first petition for summary suspension, the board summarily suspended the license a second time two weeks later, but not until the dentist, through his attorneys, sought a temporary restraining order and preliminary injunction in superior court. Judge Gleason

denied injunctive relief and remanded it back to the agency for hearing. The hearing is expected to run through January.

The Division of Occupational Licensing sought summary suspension of a physician's license to practice medicine, which the State Medical Board ordered on December 3, 2001. The summary suspension was based on a state statute that provides for such suspensions where the licensee poses a "clear and immediate danger to public health and safety." In the division's petition for summary suspension, the agency identified a continuing pattern of the doctor's failure to properly assess and evaluate his patients' candidacy for various surgical procedures, his failure to fully and adequately disclose to his patients the risks of complications, his failure to perform these various procedures in a manner suited to reduce risk, and his failure to provide appropriate post-operative medical care, especially where known complications were involved. This conduct is also the subject of a separate ongoing discipline matter involving the doctor that is set for hearing to begin at the end of February 2002. The doctor requested a hearing on the suspension, which was scheduled for January 2002. AAG Robert Auth is representing the division in both the suspension and the disciplinary proceedings.

BOARD OF NURSING REVOKES LICENSE

On December 5, 2001, the Board of Nursing adopted in full the proposed decision from Hearing Officer David Stebing and revoked William Major's license as a certified nurse aide (CNA). Following a hearing which took place in Ninilchik on August 28-29, 2001, the hearing officer found that Mr. Major, an in-home care provider for a quadriplegic adult woman, (1) obtained his original license as a CNA (and renewed it) through fraud, deceit, and intentional misrepresentation; (2) physically assaulted his client on one occasion; (3) left his client without making arrangements for her care on one occasion when he had to serve a short prison sentence; (4) engaged in an ongoing consensual sexual relationship with his client; and (5) failed in general to respect his client's rights and dignity, all of which violated various disciplinary statutes or regulations. AAG Robert Auth represented the Division of Occupational Licensing in this proceeding.

COURT UPHOLDS REVOCATION OF NURSING LICENSE

On December 6, 2001, Superior Court Judge Joel Bolger issued a memorandum decision affirming the Board of Nursing's November 17, 2000, decision to revoke Ronald Medley's nursing licenses on the basis that he had withdrawn the life support of a patient without contacting the attending physician. The court specifically rejected Medley's legal arguments that (1) the subsequent renewals of Medley's license could be the basis for equitable estoppel, and (2) the delay in initiating disciplinary proceedings was a violation of due process. The superior court determined that revocation was appropriate because Medley was convicted of a felony (i.e., negligent homicide) that was substantially related to his duties as a nurse, he intentionally or negligently engaged in conduct that resulted in injury to his client, and he removed a patient's life support without appropriate medical or legal authorization, all of which violated various disciplinary statutes or regulations. AAG Robert Auth represented the Division of Occupational Licensing and the Board of Nursing in the appeal.

REGULATORY COMMISSION OF ALASKA HOLDS HEARING ON ENSTAR

AAG Steve DeVries represented the Public Advocacy Section (PAS) of the RCA in a four-day hearing before the commission that concerned Enstar's rates and revenue requirements related to natural gas. Enstar claimed it has a shortfall of $1.6 million in revenue, entitling it to a rate increase. The PAS through AAG DeVries argued that Enstar was enjoying a revenue surplus of $2.2 million and

that rates should be reduced by 2.39% across the board pending a determination of Enstar's rate design. Items in dispute included Enstar's novel request for rate base treatment of ordinary business expenses, (which the PAS argued will result in a windfall to Enstar), operating expenses claimed by Enstar (including items such as country club dues, memberships in professional and social organizations/clubs, employee perks such as turkeys, holiday parties, bottled water, flowers, and advertisng expenses for promotional items such as imprinted balloons, golf tees, and oven mitts), non-recurring expenses, construction work in progress, and rate of return. A decision is pending.

Governmental Affairs

STATE WINS SUMMARY JUDGMENT IN "NONPARTISAN PARTY" CASE

Superior Court Judge Reese granted our motion for summary judgment in a case brought against the State Division of Elections by a group calling themselves the Nonpartisan Party. In this case, the Nonpartisan Party sought recognized political party status from the State Division of Elections. The division denied the Nonpartisan Party's request because the nonpartisan group had not complied with the requirements set out in statute and regulation in order to achieve recognized party status. The Nonpartisan Party then sued the Division of Elections challenging the denial of recognized party status. The Nonpartisan Party essentially wanted to appropriate to itself a percentage of the voters registered with the state as nonpartisan, claiming that these people wanted to be members of the Nonpartisan Party. We moved for summary judgment, and the judge agreed with the state's position. In his order granting the state summary judgment the judge found that the plaintiff's "claim and arguments [were] frivolous, semantic game playing, and plaintiff will be ordered to pay the full, reasonable cost of defense of this matter." This case was handled by AAG Sarah Felix.

IN RE CONSOLIDATED REDISTRICTING CASES

On February 1, Superior Court Judge Mark Ridner issued a 130-page opinion in which he upheld all but two of the districts drawn by the Alaska Redistricting Board for the 2000 Census cycle. District 16, which covers Chugiak and Eagle River, was declared invalid for failing to be compact. District 12, covering Northern Mat-Su, Denali Borough to Delta Junction, was also declared invalid for failure to meet the socio-economic integration standard. This decision followed a three-week trial and an expedited discovery schedule. Plaintiffs consisted of nine groups of municipalities and individuals represented by five law firms. Defendants consisted of the Alaska Redistricting Board with the State Division of Elections and certain Native corporations as intervenors represented by two private law firms and our office.

The superior court remanded the plan back to the redistricting board for further proceedings to correct the errors noted and stayed the decision for purposes of appeal. The parties immediately cross-appealed only to be advised by the Alaska Supreme Court that it considered the case not yet ripe for appeal because of the remand order. The supreme court scheduled the hearing of cross petitions of review which would have a decision within the time limits originally set by the court for the resolution of appeals. There needs to be guidance from the supreme court on ultimate legal issues before the board is required to undergo the effort to redraw election districts. It is hoped that the court will take action that will result in a final plan that can be implemented within all existing statutory deadlines for the 2002 election cycle.

DISMISSAL ORDERED IN EMPLOYMENT CASE

The court ordered partial summary judgment in *David Witt v. Department of Corrections,* dismissing the contract claims of a former Anchorage Correctional Industries employee. He had sued for wrongful discharge after he was dismissed during his probationary period of employment. He claimed that the department dismissed him to contract out the services he performed to a private vendor. The court concluded that contracting out the employee's services, even if this were the motive for his discharge, would not violate the employee's employment agreement. The employee is seeking reconsideration of the court's ruling. Earlier in the litigation, the court dismissed the employee's tort claims.

Legislation/Regulations

SECOND SESSION OF THE TWENTY-SECOND ALASKA STATE LEGISLATURE CONVENES

During January 2002, the Legislation and Regulations Section spent an active month editing and finalizing legislation for the governor's consideration. The legislature convened on January 14 to address important issues facing the state.

The section also reviewed, edited, and approved for filing regulations. These regulation projects included the following subjects: child care licensing and tuberculosis clearances for child care facilities for the Department of Education and Early Development, right-of-way and outdoor advertising regulations for the Department of Transportation and Public Facilities, release of certain confidential information by the Department of Fish and Game, interest rate and general student loan regulations for the Alaska Student Loan Corporation and the Alaska Commission on Postsecondary Education, miscellaneous regulations for the state occupational licensing boards, and permits by rule for portable oil and gas facilities for the Department of Environmental Conservation.

Natural Resources

TRUE NORTH MINE APPEAL ARGUED

Fairbanks office chief Mary Lundquist recently participated in oral argument in the True North Mine appeal, *Neighborhood Mine Watch v. DNR*. The question before the court is whether under AS 38.05.850 DNR has to refashion the applicant's proposed project (in this case, development of a mining road to transport ore from the mining pit to the millsite for processing) to provide the greatest economic benefit to the state and the development of its resources. The court is also looking at whether DNR should have issued a best interest finding (although not required by statute) based on a claim of promissory estoppel.

The Fairbanks Natural Resources section is also advising DNR regarding a proposal by Fairbanks Gold Mining Incorporated to expand the True North Mine pit. This proposal will extend the True North Mine life by several years, as well as require ore haul trucks to continue use of the True North haul road. This road is at the center of the True North appeal and has been a highly contentious point with the nearby residents. Public comment closes on February 19 on this project.

FORMER FEDERAL ATTORNEY JOINS JUNEAU NATURAL RESOURCES SECTION

The department recently hired attorney Blaine Hollis to fill the Juneau natural resources position vacated by Shannon O'Fallon. Blaine completed a career with the Coast Guard, serving for eleven years as a legal officer. Some of that time was spent in Alaska, first

with Coast Guard activities related to the Exxon Valdez grounding and then with federal fisheries enforcement while attached to the U.S. Attorney's office in Anchorage. Blaine also served as the Coast Guard's lead advocate for its legislative proposals on Capitol Hill. After retiring from the service, Blaine worked for the NOAA General Counsel's office on fishery management issues and, most recently, as the staff attorney for the Alaska Network on Domestic Violence and Sexual Assault in Juneau. The department welcomes Blaine and is pleased to have his range and depth of experience.

BOARD OF FISHERIES CHIGNIK CO-OP REGULATION

In January, we helped the Board of Fisheries draft regulations to allow commercial fishing by a cooperative in the Chignik salmon fishery. The cooperative would fish fewer boats, at a somewhat slower pace, to reduce overhead and assure better fish quality. The regulations would allow the department to allocate between cooperative participants and the rest of the fleet, including separate fishing periods for the two groups. The board realized that the new regulations raise many legal issues, but felt compelled to take some proactive steps to address the severe economic challenges the commercial fishing industry faces, including reduced prices for fish and weakening markets caused by rising farmed salmon production in foreign countries.

TITLE TO JUALIN MINE ROAD QUIETED IN THE STATE

Following four years of negotiations, the U.S. Forest Service, a number of mining claimants, and the State of Alaska reached a settlement that secures a permanent highway easement for the state for the Jualin Mine Road at Berners Bay in Southeast Alaska. The mining claimants and the state believe the original road and tramway were RS 2477 rights-of-way. In 1988, Curator American, Inc., a lessee of the largest mining claimant, proposed rebuilding the road. The road as built was relocated from the historic route in some places for environmental reasons.

On January 11, 2002, the state moved to intervene in the lawsuit to join the settlement agreement filed the same day. On January 14, 2002, U.S. District Court Judge Holland signed the consent decree and entered final judgment quieting title in the state to the road as built.

TWO NEW APPEALS FILED

Two new appeals were filed in January. In the first, *Koyukuk River Tribal Task Force on Moose Management v. State*, the state prevailed before the trial court in a challenge to its moose regulations in Game Management Units 21D and 24. The case alleged that the state violated the sustained yield clause of the Alaska Constitution and the subsistence statute. The state was granted summary judgment because the plaintiffs had never proposed any regulatory changes to the Alaska Board of Game and thus failed to exhaust their administrative remedies. The state was granted an award of costs and attorney's fees, which the plaintiffs have now appealed.

In the second appeal, *Sherman Smith v. Bill Stockwell*, a developer/miner brought suit pro se against a number of his neighbors, alleging that their viewpoints on limiting development constituted a slander of his chosen creed and lifestyle, in violation of the Alaska Constitution. He sought an injunction prohibiting their continued political activities. The state represented an individual who had only acted in his capacity as a member of the local Fish and Game Advisory Committee, reporting the committee's views on the subject. The state obtained a dismissal of the case, and the plaintiff has now appealed to the Alaska Supreme Court. He argues that because Article VIII of the Alaska Constitution promotes maximum use, benefit, and development of Alaska's natural resources, his political viewpoints are constitutionally correct and

those of the defendants violate the constitution and must be suppressed.

Special Litigation

STATE APPEALS DECISION OF WORKERS' COMPENSATION BOARD

The state appealed a decision of the Alaska Workers' Compensation Board denying the state from taking a statutory off-set for a portion of an employee's social security retirement benefit if the off-set results in the employee receiving less than the minimum compensation rate. The board decided that the minimum rate constitutes a solid floor below which no payment can fall, even if the offset is mandated by statute. AAG Knudsen represents the state in proceedings before the board and now on appeal.

SUPREME COURT ORDERS FURTHER BRIEFING IN *OLRUN* APPEAL

In the Denali Highway case involving the deaths of the Olruns, following oral argument of the cross-appeals in December, the Alaska Supreme Court issued a *sua sponte* order requesting the parties to identify and summarize the facts in the record relating to trooper decision-making after the initial report and which bear upon the latest time that decisions had to be made to initiate a successful search and rescue attempt. AAGs Venable Vermont and Gary Guarino are responding to this order of the supreme court.

Transportation

AAG John Steiner was invited to serve on the 12-member legal affairs steering committee of the Airports Council International - North America (ACI-NA). ACI-NA consists of approximately 150 governing bodies (primarily state, regional, and local entities) that own and operate airports. ACI-NA member airports handle over 95 percent of the domestic - and virtually all of the international - air passenger and cargo traffic in North America. The legal affairs committee addresses the development and implementation of legal rules and policies affecting the entire airport industry. The committee provides individual airports with substantial support, advice, training, and a forum to share documents, discuss problems, and learn new approaches from industry experts. Our office has long participated in the legal affairs committee. The invitation to serve on the steering committee is a personal honor for John. His involvement, as a member of the steering committee, with the continent's most prominent and experienced airport counsel will further assist Alaska's airport system.

SNOW REMOVAL CONTRACT CLAIM SETTLED

AAG Tom Dillon settled a claim stemming from a contract to clear snow from the Whittier Tunnel access road during the winter 2000-2001. Snowfall during the winter of 2000-2001 was very light, and DOTPF was able to handle most of it with little effort. As a result, the contractor was not called out to do much work. The contractor filed a claim for $1.2 million, claiming that DOTPF breached the covenant of good faith and fair dealing, and anticipatorily repudiated the contract by using its own equipment to remove snow instead of calling out the contractor. In the course of discovery, a former DOTPF employee admitted that he had represented to the contractor that DOTPF would not use its own equipment to remove snow in work area. In the week before the scheduled hearing, DOTPF settled the claim for $22,500, which was based on the amount the contractor would have earned if he had been called out to perform the work that was actually performed by DOTPF.

STATE v. GRAPHIC NORTH, INC. REACHES SETTLEMENT

This is an eminent domain case. A small strip of land was taken from a business for a highway widening project in Fairbanks. The case involved a difficult parking issue on a small lot on which was located an owner-operated printing business in a building constructed in 1955. The taking reduced the limited available parking. The hearing master appointed by the court indicated that a portion of the building should be removed to allow for more parking, and based his damage award on this determination. However, he refused the landowner's request for funds to replace the lost interior space by replacing it with a new second story. After a complex and hard-fought master's hearing, which resulted in a detailed 17-page decision, we were able to settle the case. Due to a number of uncertainties related to the calculation of damages, we were able to negotiate a settlement below the total (including costs, fees, and interest) master's award.

AMHS BRINGS CLOSURE TO M/V KENNICOTT AND M/V COLUMBIA CONTRACT CLAIM DISPUTES

Halter Marine, Inc., was awarded a $77.4 million contract to construct the ocean-class ferry M/V Kennicott in 1995. The Kennicott was delivered in 1998. Approximately six months after delivery, Halter submitted a claim for what eventually amounted to $23 million in disruption and undocumented changes, a $23 million claim for impacts to other Halter projects, and a $7 million pass-through claim for subcontractors. During the course of the litigation, Halter's parent company Friede Goldman was forced to declare bankruptcy after cost-overruns on the construction of several deep-sea oil rigs. Halter's bankruptcy counsel recommended abandoning Halter's Kennicott claim because it was viewed as "burdensome" to the estate, and because the claims "are of little or no net value to the estate."

Halter withdrew its claims, leaving only Jamestown Metals' pass-through subcontractor claim. The surety on the project that had issued the payment bond—Fireman's Fund Insurance Co.—picked up Halter's claim and continued to prosecute the claim to avoid payment of Jamestown's pass-through claim. After substantial discovery, with dozens of depositions scheduled, the state, Fireman's Fund, and Jamestown entered into a settlement agreement, where the state agreed to pay $500,000, and Fireman's Fund agreed to pay $750,000 to Jamestown to settle the case. The case was settled during November 2001.

The final amount paid to Halter for construction of the M/V Kennicott was $74,638,438, taking into account the $2.7 million withheld by AMHS for warranty work. The original budget for the entire cost of the ship, established in 1992, was $86.2 million.

AMHS also resolved litigation with Alaska Ship and Drydock (ASD) of Ketchikan concerning the refurbishment of passenger cabins and replacement of the M/V Columbia's service switchboard after a fire during the summer of 2000. ASD presented AMHS with a claim for $3 million in impacts and cost overruns for what ASD described as defective specifications. ASD subsequently amended its claim to include approximately $3 million in business disruption and business devastation claims, arguing it was about to go out of business. AMHS asserted, as an off-set, a claim for approximately $3 million in liquidated damages for the later delivery of the vessel.

During November, AMHS and ASD presented their cases to mediator Greg Harris in Seattle. Although no resolution was reached in November, the parties continued their negotiations in Juneau in December. Mediator Harris recommended a settlement of $1.9 million net payment by AMHS to ASD. AMHS and ASD arrived at a settlement of $1.5 million. The settlement included a management review of both ASD and the state's contracting

practices by a recognized shipyard expert. The expert will recommend ways to avoid a repeat of the construction and contracting problems encountered on the M/V Columbia during future work.

Criminal Division

ANCHORAGE

Kenneth Padgett was charged with murder in the first and second degrees for killing his mother and tampering with evidence. Padgett was at the airport attempting to fly home to Texas when airport personnel found an undeclared shotgun in his baggage. Police discovered Padgett has nine felony convictions and six misdemeanor convictions. He was arrested on a probation warrant for a prior Texas felony DWI conviction. A search of his baggage revealed his mother's identification card, women's clothing, and jewelry. Police also discovered that Padgett had pawned a large amount of VHS tapes and CDs for a few thousand dollars. He had also rented his mother's trailer to a friend of his. No one had seen his mother for 3-4 weeks. Her body was found wrapped in duct tape and sealed in the breakfast bar of her trailer. The cause of death was asphyxiation.

Josette Stackhouse was sentenced to ten years in jail with three years suspended and ten years probation for assault in the first degree. She received two years in jail with two years suspended and ten years probation for assault in the second degree in the violent shaking of her three-month-old baby. Physical evidence also revealed an abusive history of various broken limbs, broken ribs, and bruises.

A jury convicted Jerome Logan of murder in the first and second degrees and assault in the third degree for the shooting death of Billy Waterson. Logan and Waterson were at a party when a fight between Logan and another man broke out. Logan went to his vehicle, got a gun, and started to point it at the man he was fighting with. Waterson then tackled Logan and during their struggle Logan shot Waterson twice, once in the cheek and once in the shoulder. Two days later, Waterson was declared dead. Sentencing is scheduled for June 2002.

BARROW

A Barrow man was convicted by a jury of a misdemeanor assault, but acquitted of assault in the first degree for hitting his wife on the head with a large metal plier. Judge Jeffery imposed a maximum one-year sentence on the defendant.

During a search under warrant for alcohol in a Nuiqsut residence, North Slope officers discovered, in plain view, pornographic photographs the defendant had taken of his minor girlfriend. He was subsequently indicted for importation of alcohol and unlawful exploitation of a minor. The grand jury also indicted a man from Point Lay for burglary and a Barrow resident for felony DWI.

BETHEL

Hoover Howard, Jr., was found guilty of assault in the third degree (DV), misconduct involving weapons in the third and fourth degrees, and resisting arrest after a jury trial. He was found not guilty of disorderly conduct during the same trial.

Clifford Lake was found not guilty of sexual assault in the first degree or, in the alternative, sexual assault in the second degree after a jury trial.

Julia Kelly was indicted on one count of sale of liquor without a license. Hans Halverson was indicted on two counts of sexual assault in the second degree, burglary in the first degree, and assault in the third degree. Albert Smith was indicted on one count of attempted murder in the first degree and one count of assault in the third degree after strangling a police officer until

he lost consciousness. Patrick Yupanik and Joe Paul were indicted on multiple counts of burglary in the first degree, theft in the second degree and criminal mischief in the second degree.

FAIRBANKS

Teresa Foster was appointed District Attorney, replacing Harry Davis, who retired November 30.

A group of off-duty soldiers decided to settle a score with some people living in a local trailer court. The soldiers beat on the door of the trailer and managed to open one of the doors before being met with a fusillade of gunfire from the occupants, who had an arsenal of firearms. One of the soldiers was killed, and one other returned fire into the trailer, but did not hit anyone. The case is still under investigation by troopers and military investigators.

The repeal of the city domestic violence assault ordinance, effective January 1, 2002, resulted in a 46% increase in the state's domestic violence assault referrals during the first month.

At month's end the state is still in trial on a murder case from Kaltag. The defendant shot a friend with a shotgun while the victim was seated in a chair. The defense claims it was an "accident."

An evidentiary hearing was conducted into the suitability of Tanana as a district court trial site. During the proceedings it was learned that the court system had not inspected its "bush" trial facilities in the Interior since the early 1990's. The court's administrative rules require an annual review.

Daniel Lewis, the pipeline shooter, was indicted this month on a burglary and vehicle theft that occurred before the pipeline incident. Bloodstains on broken window glass at the scene of the burglary contained DNA matching his profile.

KENAI

A Homer jury convicted 17-year-old Peter Basargin of sexual assault in the first degree and sexual assault in the second degree after a week-long trial. Larry Seip was convicted of stalking in the second degree in a two-day Homer jury trial.

Jerome Hall was convicted by a Seward jury of misconduct involving weapons, DWI, and false report. After being stopped for a traffic violation, Hall added yet another name to his list of 26 aliases by giving the officer a name and social security number that could not be located in APSIN or NCIC. Not able to identify the driver, the officer asked him to come back to the patrol car to get further information. When the officer patted Hall down he found a revolver in Hall's rear pants pocket. Hall was arrested and subsequently admitted his true identity. During DWI processing back at the station, police discovered that Hall was on felony probation in California. After the court suppressed Hall's statements as to why he lied to the officer about possessing any weapons, the defendant took the stand at trial and told the jury that he did not have the gun in his pocket as the officer had testified, but that the gun was under the seat of the car, and because it was his wife's car he did not know about it.

A Homer jury convicted Bruce Susinger of assault in the fourth degree for striking a female in the face during an argument over who would play a song on the jukebox at a local Homer bar. Both the defendant and the victim arrived at the jukebox at approximately the same time. Susinger got a couple of quarters in first, but not enough to play a song, so the victim put in some quarters and began selecting songs. Susinger pushed the victim and called her offensive names. When the victim pushed back and also used offensive names, the defendant spit in her face and punched her "so she wouldn't have the chance to hit him first." At sentencing after a ten-minute verdict, the judge commented that the only thing quicker than the verdict was the defendant's temper.

The jury took just 16 minutes to find a defendant guilty of DWI. They did not believe his defense that even though the key was in the ignition and the engine was running, he was not “operating” because he was turned sideways in the driver's seat.

Another defendant was convicted of interfering with the report of a domestic violence crime, but acquitted of assault. The defense continuously told the jury "the trial was a search for the truth" even though he did not give notice of self-defense until just before closing arguments. The victim claimed at trial it was "mutual combat" and that she was both the "initial and primary aggressor." The state found out after trial that the defendant had been a champ wrestler in school.

A jury convicted Friday Simmons of misconduct involving weapons. Simmons claimed he was impaired due to being beat by a mysterious gang of black men who broke his ankle - but the former EMT showed no signs of injury and refused all medical treatment.

David Anderson, convicted by a jury of sexual assault in the first degree for raping a 13-year old on the hood of a car while his girlfriend held the victim's wrists, received a sentence of 12 years with 4 years suspended.

The grand jury indicted a woman who forged several checks on her ex-boyfriend's account. The boyfriend is very avid about prosecuting. He even informed the office that his ex-girlfriend had a warrant outstanding in Montana for forgery. Montana authorities confirmed the warrant. They were not prepared to extradite, due to the cost involved, but the ex-boyfriend was so civic-minded that he offered to pay the costs of extradition. Montana is considering taking him up on the offer. It is of interest that the charge in Montana is based on this woman’s forging checks on her ex-husband's account so that she could travel to Alaska to be with the current victim.

KETCHIKAN

A jury found Troy Smart guilty of assault in the second degree and tampering with physical evidence. Last Halloween, AST Sgt. Lonnie Piscoya and an airport police officer contacted Smart at the airport to follow up on a report that he was carrying heroin. He agreed to a search. Sgt. Piscoya found a 2"-diameter, thin plastic bag under the insole of his shoe. Smart jumped Sgt. Piscoya to grab the bag. The airport police officer tried to stop Smart. Sgt. Piscoya went down when Smart attacked him. Unfortunately, his leg remained planted; it was broken just below the knee and ligaments were torn at his ankle. Sgt. Piscoya used his taze gun on Smart, but that did not stop him. He then emptied his pepper spray can at Smart. That slowly stopped him. However, Smart was able to get the bag and eat it. The jury convicted Smart of the assault for the injuries to Sgt. Piscoya's leg and tampering for eating the bag.

A jury found Frank Mooney guilty of sexual assault in the first degree. In the early morning last December, the police got a 911 call from a man in a pay phone saying that a half-naked man was chasing a half-naked woman down the street. The police arrived and found the woman on the ground and Mooney on top of her with his hands around her neck. She was only wearing a short coat, and he was only wearing a pair of pants. She said that they were at his apartment and were beginning to engage in sexual relations when she decided not to but he forced her to continue by threatening and hitting her and that she was able to escape with only a coat. She had some injuries. He claimed that he was chasing her because she had stolen his money. They found his money in his apartment in his pants. He was not wearing his pants because he grabbed her pants to chase her.

A jury found Robert Deprey guilty of sexual assault in the first degree. A woman met Deprey at a bar and he said she could ride in

the taxi with him. Deprey had the cab go to a lot behind the local Burger King. The cab driver was reluctant to let the victim out because he was suspicious of Deprey, but he did so. Once Deprey was alone with the victim, he forced her to engage in sexual intercourse telling her that he had just got out of prison and knew how to hurt her. He had in fact just gotten out of prison for robbery. After he left her, she flagged down a passing police car driving near the front of the Burger King. She identified Deprey, whom the police had contacted a few blocks away. He gave conflicting stories to the police: initially, he claimed that they did not have sexual intercourse, but when he talked with his wife, he asked her what would happen to their marriage if he did have sexual intercourse with her and then told the police that they had consensual sexual intercourse. At trial, he came up with another story -- that he and the victim went around to various hotels trying to get a room and he tried to get money from his wife.

The grand jury indicted a number of persons for arson in the first degree, sexual assault in the first degree, sexual abuse of minor in the first degree, assault in the second degree, assault in the third degree, burglary in the first degree, theft in the second degree, felony failure to appear, and felony DWI.

KODIAK

A Kodiak woman was sentenced to 45 months in jail, with 36 months suspended, and placed on probation for six years following her conviction for misconduct involving a controlled substance in the fourth degree, a class C felony. A search of her trailer revealed 40 bags of marijuana and other evidence of her retail operation.

A Kodiak man was sentenced to 48 months with 24 months suspended and placed on probation for six years following his conviction for sexual abuse of a minor in the third degree, a class C felony. In addition this defendant had his probation revoked and was sentenced to five months to serve in a misdemeanor probation case, with all time to run consecutively. Although the minor wished to have continuing contact with the defendant, as part of his probation the defendant was ordered to have no contact with the victim without first obtaining the written permission of her parents until such time as the minor reaches her age of majority or is otherwise emancipated.

A Kodiak man was indicted for terroristic threatening, a class C felony, following his return of a DVD case to Blockbuster into which he had poured white flour and attached a note indicating that the white powder was anthrax. This act is alleged to have placed multiple store personnel in fear of physical injury.

A Kodiak man was indicted for attempted first-degree murder after using a .380 automatic revolver to fire a shot at a man who is alleged to owe the defendant $10,000 from a gambling debt. As the victim was attempting to pull backward out of his driveway, the defendant drove up behind him, got out of his car, came up the driver's side window and fired one shot at the victim through the car window. Upon seeing the gun, the victim lurched backwards in his seat just as the gun was fired and fortunately the bullet hit the empty passenger's seat. The pistol then jammed. From his previous tactical experience in the Navy, the victim recognized that the pistol had jammed and was able to then wrestle the gun away from the defendant and run into his house and call the police.

KOTZEBUE

The local Western Alaska Alcohol and Narcotics Team (WAANT) unit, consisting of one Kotzebue Police officer and one local trooper, has been very busy in Kotzebue and the surrounding villages. Two cases of interest involve a liquor seizure in Kotzebue and a drug and money seizure in Noorvik. In Kotzebue, over 80 bottles of liquor were seized at the airport after it arrived from Anchorage. The

liquor was not properly labeled. Three people have been identified as suspects but no charges have been filed yet.

During a knock-and-talk investigation in Noorvik at a suspected drug dealer's residence, officers seized a small amount of marijuana and over $7,000 in cash from the unemployed suspect. Misdemeanor drug charges have been filed against Allen Sours.

ADA Windy East was asked to give a presentation to the local police on courtroom testimony. She pulled out all the stops, including a Power Point presentation. The session was very well received and Windy got a rave review from the Kotzebue police chief.

NOME

Four individuals were indicted for their involvement in a series of transactions involving the schedule IA drug oxycodone. Geoffrey Jackson, Gary Cantrell, and Vaughn Munn were all charged with the sale of the drug in late January; Richard Lockwood was charged with simple possession.

Two separate incidents from the village of Gambell resulted in felony domestic assault indictments. Daniel Appassingok was charged with assaulting his wife with a rifle. Farrell Iyakitan was charged with assaulting his sister by pointing a shotgun at her, threatening to kill her. In the Appasingok case, the defendant had actually armed himself at some point with a second rifle. In a post-arrest interview, Appassingok told the VPSO, when questioned about the second gun, that his wife "just wouldn't listen" when he only had the one gun.

Nicholas Tom was indicted for a residential burglary in which a quantity of jewelry was stolen and a resident of the apartment sexually assaulted.

Two defendants in unrelated felony-level (second offense) furnishing alcohol to minors cases entered no contest pleas and are awaiting sentencing. Other changes of plea included a felony assault from Elim and a last minute (morning of trial) plea in sexual assault case from the village of Teller.

An extended evidentiary hearing was held on the admissibility of murder defendant Ben Noyakuk's various statements to investigating troopers. Judge Esch issued a ruling suppressing Noyakuk's initial (and largely exculpatory statement), but allowing admission of four subsequent, and more inculpatory, statements.

PALMER

Gordon Samel pled no contest to arson in the second degree. Samel set fire to a home in Wasilla after consuming cocaine for three days. He told the AST investigator that he thought cats were after him and he started the fire to keep them away. Samel resisted the troopers who were arresting him. Sentencing is set for April 12.

Michael Padilla pled no contest to one count of sexual assault in the second degree and he was sentenced to serve seven years. Padilla picked up a woman in Anchorage and drove her to his trailer on the Glenn Highway. When she tried to run away, he tackled her, tied a rope around her wrist, and brought her back to his trailer. The victim was able to knock the phone off the hook and dial 9-1-1. Padilla noticed the phone and unplugged it. He then began to rape her, but was interrupted when the Alaska State Troopers arrived.

Judge Smith sentenced Darren Adams to a maximum sentence of 20 years for assault in the first degree and 10 years for burglary in the first degree, consecutive, plus another five years for a probation violation. Adams was released on parole/probation after serving 10 years for an attempted sexual assault and robbery in Anchorage in 1991. Within one month of his release he broke into the victim's home, attacked her with a knife, and tried to strangle her, under remarkably similar

circumstances to his Anchorage crime 10 years ago. Judge Smith agreed that Adams was incorrigible with virtually no hope of rehabilitation, found him a worst offender, and gave him maximum sentences on everything.

A 20-year-old man was indicted for attempted murder in the first degree and assault in the first and third degrees. The charges stemmed from a stalking incident: the defendant was seen crouching outside a residence where the object of his affections was living with her boyfriend and his grandparents. The 75-year-old victim-grandmother saw the defendant outside the house in the middle of the night. She roused her grandson to investigate. Upon going outside and inquiring as to the nocturnal visitor's business, he encountered the business end of a revolver. Although the defendant told him not to move or be shot, the grandson fled into the house, with defendant in close pursuit. The victim, armed with a .38, met the defendant "Mexican-standoff"-style, near the front doorway. She told him to get out or she would shoot. He made a "half-smile" and pulled the trigger, shooting her in the face, shattering her jaw.

SITKA

The new year came roaring in with a felony assault arrest in the early morning hours of January 1, 2002, after a man came home drunk from a party, hit his wife, and threatened their babysitter with a knife. Lester Wilde was later indicted on charges of assault in the third degree and assault in the fourth degree.

The following week a man took an AK-47 and started shooting from his apartment doorstep, past multiple adjoining apartments, at a building light nearby. When the police arrived he locked himself in his apartment and started shooting again. He was indicted on multiple charges, including two counts each of misconduct involving weapons in the second degree and assault in the third degree.

Tonya Osbakken was indicted on forgery and theft charges for stealing checks from her mother, and Lester Widmark on a burglary charge for going into a stranger's house and stealing beer and a flashlight (he was also charged with underage alcohol consumption). The Juneau DAO handled all subsequent grand jury proceedings this month as the trial calendar prevented the Sitka grand jury from convening again.

There were three trials this month. A jury found a man not guilty of assault in the fourth degree (domestic violence fear assault). Even though it was undisputed the victim was sober when she was assaulted, the court allowed her past convictions for assault when she was intoxicated to come in under the theory that someone as tough as her wouldn't have been afraid. Joseph Williams was found guilty of assault in the second degree, a lesser-included offense of attempted sexual assault in the first degree. He testified that he did try to "choke" the victim so she would be unconscious, but denied that he was trying to have sex with her. The jury apparently believed him. He is subject to presumptive sentencing for a second felony. William Novcaski was found guilty of assault in the second degree for hitting a young invitee at his B&B over the head with a metal long-handled shovel. He claimed self-defense in a trial that lasted four long days.

OSPA
(Office of Special Prosecutions & Appeals)

Prosecution News

Zaire Amin indicted for welfare fraud. Adassa Zaire Amin was indicted on one count of first-degree theft, five counts of first-degree forgery, and one count of second-degree forgery. A supplemental information was filed charging her with six counts of third-degree forgery and 45 counts of unsworn falsification. From December 1997 through September 2001, Amin failed to disclose to the Division of

Public Assistance all her bank accounts plus unreported income in the amount of $41,175.01. In addition, she committed forgery by signing another person's name on five State of Alaska treasury warrants; as a result, she received an additional $40,024.00 to which she was not entitled.

Foster convicted and sentenced for importation. Percy Foster pled no contest to one count of attempted importation of alcohol and one count of attempted alcohol sale without a permit. Troopers in Kotzebue learned that Foster had picked up a shipment of alcohol from Northern Air Cargo and loaded it on his snowmachine, bound for the dry community of Noorvik. On the first count, Foster was sentenced to 180 days with 150 suspended, two years probation, and was required to forfeit the snowmachine. On the second count, Foster was sentenced to 45 days with 30 suspended with two years of probation.

Rock sentenced for transport violation. Vernon Rock was contacted at the Ted Stevens International Airport in Anchorage by officers with the Western Alaska Alcohol and Narcotics Team (WAANT). Officers learned that Rock was traveling from Anchorage to the damp community of Unalakleet. They discovered three bottles of hard alcohol. Rock had not properly marked the shipping containers and was sentenced to 120 days with 120 suspended, a fine of $1,500 with $1,000 suspended, and placed on probation for three years.

Weyiouanna convicted in Nome. Tina Weyiounna pled no contest to a single charge of importation of alcohol into a local option area. Weyiounna was contacted at the Shishmaref Post Office after U.S. Postal Inspector Bill Skytta determined that the package she had sent to herself from Anchorage contained alcohol. Weyiounna received 100 days with 80 suspended and was placed on probation for two years.

Civil Litigation News

Sex offender registration update. On January 18, 2002, U.S. District Court Judge Holland enjoined the prospective enforcement of Alaska's sex offender registration law as to all defendants with single sex offense convictions arising from conduct that occurred before August 10, 1994. As the basis for his injunction, Judge Holland relied on *Doe v. Otte*, 259 F.3d 979 (9th Cir. 2001), where the court held that Alaska's sex offender statute violated the ex post facto clause with respect to two defendants who committed their offenses prior to August 1994. Judge Holland declined to adopt the state's argument that *Doe v. Otte* was not controlling because the Ninth Circuit had misinterpreted the law as requiring in-person verification four times a year (the law doesn't) or that the registration and notification provisions of the law should be separately considered, instead of together, as they were in *Doe v. Otte*. *Doe v. Godfrey*, No. A02-0014 CV.

Petitions & Briefs of Interest

Petitions of Interest

Probable cause for search warrant. Judge Link suppressed evidence of a marijuana grow seized pursuant to a search warrant after concluding that officers smelling growing marijuana coming from a house with high electrical usage did not have probable cause to believe that the defendants had more than a personal-use amount of marijuana. The state argues in a petition for review to the court of appeals that Judge Link has misconstrued the probable-cause standard and that the state is not required to eliminate all possible innocent explanations for criminal conduct. *State v. Anderson/Ottaway*, No. A-8231.

Evidence Rule 404(b)(4). The court of appeals held in *Carpentino v. State*, Op. No. 1781 (Alaska App., January 4, 2002), that

evidence of the defendant's sexual abuse of the victim's brother consituted propensity evidence that was erroneously admitted under Evidence Rule 404(b)(1). The state argues in a petition for rehearing that the evidence was nevertheless admissible under Evidence Rule 404(b)(4) (allowing for the admission of crimes of domestic violence involving the same or another victim in a prosecution for a domestic violence crime).

Briefs of Interest

Pychotherapist-patient privilege. Yukon-Kuskokwim Correctional Center requires each defendant to undergo a routine pre-admission evaluation to determine his physical and mental health status. The state argues that the defendant's statements made to a nurse during this routine evaluation are not protected by the psychotherapist-patient privilege. *Ramsey v. State*, No. A-7295.

Elements of burglary. The state argues that a conviction for attempted burglary should be affirmed even though the indictment and jury instructions failed to specify the target offense of the burglary because (1) the burglary statute requires only a general criminal intent to commit a crime inside, and (2) the defendant likely had tactical reasons for withholding objections to the indictment and jury instructions (which required only "an intent to commit a crime inside"). With respect to the first argument, the state urges the court to distinguish *Adkins v. State*, 389 P.2d 915 (Alaska 1964), which holds that a burglary indictment must specify the target offense. *Semancik v. State*, No. A-7286.

Plea-withdrawal. The state argues that the defendant's attorney having overlooked some cumulative discovery related to the victim and consequently not sharing or discussing it with the defendant does not constitute a fair and just reason to allow the defendant to withdraw his plea. *Garay v. State*, No. A-7902.

Court Decisions of Note - Alaska

Remedy for alleged wrongful denial of license. When a person believes they have been wrongly denied or deprived of a license to engage in a regulated activity, the person must normally pursue civil remedies to obtain or regain the license, rather than engaging in the regulated activity without a license. *Tenison v. State,* Op. No. 1780 (Alaska App., December 28, 2001).

Defense to criminal charge of engaging in regulated activity without a license. A person cannot assert as a defense to a criminal charge of engaging in a regulated activity without the proper license that the government wrongfully refused to grant the person's application for the license. Thus, a woman whose driver's license renewal application was denied because she did not provide her social security number – she claimed she had religious objections to providing the number – could not later assert as a defense the unconstitutionality of the social-security-number requirement when she was caught driving without a license. *Tenison v. State*, Op. No. 1780 (Alaska App., December 28, 2001).

Driver's license - social security number requirement. The social security number requirement for driver's licenses is on its face constitutional. *Tenison v. State*, Op. No. 1780 (Alaska App., December 28, 2001).

First Amendment - freedom of religion. The First Amendment guarantee of the free exercise of religion does not excuse persons from complying with a valid and general law of neutral applicability even though the law may prescribe conduct their religion forbids. *Tenison v. State*, Op. No. 1780 (Alaska App., December 28, 2001).

Sex offender treatment ordered as part of a sentence. Under AS 12.55.015(a)(1), a judge

can order a defendant, during his prison term, to participate in treatment programs related to the defendant's rehabilitation. The court of appeals affirmed the trial court's determination that requiring the defendant to "take advantage of" available sex offender programs was the equivalent of an order under this statute requiring the defendant to "enroll in and fully participate in" a sex offender treatment program and that it provided sufficient notice to the defendant that he was to make meaningful efforts to participate in the program. *Alexander v. State*, Op. No. 1778 (Alaska App., December 28, 2001).

Parole board – standard of review. A parole board's factual determinations are reviewed to determine whether they are supported by substantial evidence; the board's decision to revoke a defendant's parole is reviewed for an abuse of discretion. *Alexander v. State*, Op. No. 1778 (Alaska App., December 28, 2001).

Peremptory challenge of a judge - exception to time limit narrowly construed. Under Criminal Rule 25(d)(2), a defendant must exercise a peremptory challenge of the trial judge within five days of notice that the case has been assigned to that judge. The rule should be relaxed when the defendant has had no opportunity to discuss the matter with his or her attorney during the five-day period – for example, where the defendant requests counsel but the formal appointment does not occur until after the five-day period. The rule is not relaxed, however, where the defendant and counsel have had a chance to confer and neglect to talk about the matter. *Wright v. State*, Op. No. 1782 (Alaska App., January 4, 2002).

Evidence Rule 404(b)(1) – evidence of common scheme or plan. Where it was not shown that the defendant's conduct in sharing a bed with a young child was part of an over-arching plan to engage in sexual activity, the court rejected that evidence of the defendant's conduct was admissible under Evidence Rule 404(b)(1) as evidence of a common scheme or plan. The court held that the evidence was offered for a prohibited propensity purpose. *Carpentino v. State*, Op. No. 1781 (Alaska App., January 4, 2002).

Evidence Rule 404(b)(1) – "lewd disposition" exception to propensity evidence. In prosecutions for sexual assault or sexual abuse of a minor, evidence of other sexual assaults or sexual abuse on the same or other victims is admissible as evidence of a "lewd disposition" only if a distinctive and repeated pattern of assaultive behavior is shown with respect to the other acts. Isolated instances of sexual misconduct do not qualify. (Note: The "lewd disposition" exception was a narrow judicially created exception that existed prior to the passage of subsections (b)(2), (b)(3), and (b)(4) of Evidence Rule 401.) *Carpentino v. State*, Op. No. 1781 (Alaska App., January 4, 2002).

Evidence Rule 404(b)(2) – requirement of similar victims. Under Evidence Rule 404(b)(2), evidence of sexual abuse committed on another minor will be admissible in a prosecution for sexual abuse if (1) the other act is less than 10 years old, (2) the other act is similar to the charged act, and (3) the other victim is similar to the current victim. In a sexual abuse prosecution involving an 8-year-old girl, it was not an abuse of discretion for the court to exclude evidence of the defendant's abuse of the girl's brother, an 11-year-old boy, absent expert testimony that sex offenders often target all children in a family regardless of sex or age. *Carpentino v. State*, Op. No. 1781 (Alaska App., January 4, 2002).

Miranda custody – standard of review. Whether a defendant is in custody for Miranda purposes is a mixed question of law and fact subject to de novo review on appeal. *State v. Smith*, Op. No. 5523 (Alaska, January 11, 2002).

Miranda custody – inquiry to be made. The ultimate question to be answered in any Miranda custody inquiry is whether, given the

totality of the circumstances, a reasonable person would have felt he or she was not at liberty to end the interview and leave. Put another way, the court must resolve whether there was either (1) a formal arrest or (2) a restraint on the person's freedom of movement equivalent to that associated with a formal arrest. *State v. Smith*, Op. No. 5523 (Alaska, January 11, 2002).

Miranda custody – reasonable person inquiry. Where there are two reasonable interpretations of an event, one for and one against custody, neither is decisive to a reasonable person. The defendant's subjective belief of custody is not controlling, but is only one factor in the totality of the circumstances insofar as it may reflect a reasonable person's understanding. *State v. Smith*, Op. No. 5523 (Alaska, January 11, 2002).

Miranda custody – scope of inquiry. Events before the interview (such as a person contacting the police first), during the interview, and after the interview (such as the person not being arrested) are all relevant to the Miranda custody inquiry. Post-interview events are of limited weight in determining whether a person was in custody during the interview. *State v. Smith*, Op. No. 5523 (Alaska, January 11, 2002).

Miranda custody inquiry – questioning in a police car. The fact that an interview takes place in a police car is not determinative of Miranda custody. Questioning in a police car is generally less custodial than at a police station and may be justified by the fact that it is a private or convenient place to talk. *State v. Smith*, Op. No. 5523 (Alaska, January 11, 2002).

Miranda custody inquiry – police statements and accusatory questioning. Assurances from the police that a person is not under arrest and is free to leave generally indicate a lack of custody, but are not conclusive of the issue. Accusatory questioning by the police that indicates they have focussed suspicion on a person is one relevant factor that may be considered as weighing in favor of custody. *State v. Smith*, Op. No. 5523 (Alaska, January 11, 2002).

Standard of review where no testimony taken. Even where the reviewing court can personally hear or see the evidence on which the lower court has made its factual determination – e.g., where the only evidence below was a tape-recording that the appellate judges could also listen to – the clearly erroneous standard of review, not the de novo standard, still applies to the trial court's factual determinations, said the court of appeals in an unpublished opinion. *Glenn v. State*, Mem. Op. No. 4524 (Alaska App., January 23, 2002).

Motion for sentence modification or reduction – one motion only. AS 12.55.088(a) and .088(b), when read together, state that a defendant can file only one motion for sentence modification or reduction, and that one motion must be filed within 180 days of the defendant's original sentencing. *Stoneking v. State*, Op. No. 1783 (Alaska App., January 11, 2002).

Ex post facto clause – procedural amendments do not violate. Only the retrospective application of a substantive amendment to a law, not the retrospective application of a procedural amendment to a law, is barred by the ex post facto clause. Accordingly, the amendment to AS 12.55.088(a) limiting the filing of a motion for sentence modification or reduction to 180 days after sentencing did not violate the ex post facto clause because it was a procedural amendment prescribing the method of enforcing rights. *Stoneking v. State*, Op. No. 1783 (Alaska App., January 11, 2002).